No. 13525

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAN DIEGO GAS AND ELECTRIC COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE SAN DIEGO GAS AND ELECTRIC COMPANY

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REPLY BRIEF OF RESPONDENT

INTRODUCTION

The National Labor Relations Board has petitioned this Court for the enforcement of its order issued against Respondent on March 31, 1952, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. Section 151, et seq.), herein called the Act. The Board's decision and Order (R. 92-97) are reported at 98 NLRB No. 146.

The Petitioner has heretofore filed its brief and the Respondent presents this brief in reply thereto.

In references hereafter to the Transcript of Record the said Transcript will be designated "R."

The general question involved is whether or not the respondent discriminated against an employee by his discharge allegedly for union activity.

I.

STATEMENT OF THE CASE

The statement of the case presented by Petitioner in its brief is not complete and in many instances is not a fair statement of the facts. It is therefore necessary for the Respondent to present a statement of the case and of the facts and of the evidence which will more completely and more fairly state the case.

1. Undisputed Facts.

There is no conflict in the evidence except in one particular which will be hereinafter referred to. Therefore the following statements of facts are undisputed.

The Respondent San Diego Gas and Electric Company is a public utility supplying light, power and heat to the City of San Diego by the distribution of electricity and gas to the City and County and steam to the downtown section. It has two main plants which are frequently referred to in the evidence: Station B, at the Foot of Broadway in the City of San Diego, and Silver Gate Station at the southeast end of town, at the foot of Sampson Street (R. 190). The Silver Gate Station is rated at 160,000 kilowatts and Station B, at 100,000 kilowatts (R. 284). At Silver Gate there are three generating units and at Station B at least two units (R. 193).

A large portion of the employees of this utility are members of a union (R. 372, 387), and the principal bargaining union is International Brotherhood of Electrical Workers, Local Union 465 (R. 9).

The employee for whom the proceedings were brought is Cosby M. Newsom. He started work for the Company in February, 1948, in the Electrical Production Department. Then in turn, he became instrument technician, grade B, and was holding that position at the times referred to here (R. 101). He was one of about five instrument technicians whose duty it was to overhaul and to keep in order and to test the instruments in Station B and Silver Gate (R. 191). At the times in question here, none of these men were members of a union as indicated by the evidence.

In the Fall of 1950 Mr. Newsom and the other technicians discussed the matter of joining the union in order to secure an increase in wages (R. 104). On January 15, 1951 these employees, Cosby M. Newsom, Ollie E. Webb, Thomas R. Fowler, A. P. Botwinis, and Roy A. Shroble, signed a certificate assigning Local 465 of International Brotherhood of Electrical Workers as their collective bargaining agent for the purpose of negotiating a wage scale agreement with the Company (R. 112). Mr. Newsom then called the attention of Mr. Warden, Instrument Engineer, and his immediate superior, to this certificate, and Warden told them that he would assist them in any manner that he could, but that because of his position as Instrument Engineer he could not guarantee them any specific things without the consent of proper persons above him (R.

202). Warden contacted other signers and made the same statement to them (R. 203). He reported to his superior and then went to the office of Hathaway, the Superintendent of Electrical Production of the Company.

Mr. Hathaway stated that if the men desired a meeting with him he would be happy to arrange such a meeting with them (R. 203). Warden and Kalins, his superior, stated to Webb and Botwinis that Hathaway had offered but not requested a meeting and that if the men desired a meeting he would very much like to talk with them, but that it was Mr. Hathaway's instructions that he was not to make it a form of request from Hathaway (R. 203). Fowler and Newsom stated that they did not see how it could do any good but it could no no harm. (R. 203).

On that same day the men involved, to wit: Newsom, Shroble, Fowler and Botwinis, met with Mr. Hathaway in his office, and Warden and Kalins. Mr. Hathaway first asked the question: "Who is the spokesman for your group?" He was answered that no one had been appointed officially as spokesman (R. 204).

At this meeting Hathaway asked what it was all about, and Newsom replied that they were there to listen and not to talk. It was explained that the only items involved were wages. Hathaway wanted to know why they had not come to him first, and the men told him it would not have done any good. Hathaway explained the good relations with the union at the present

time and that it made no difference whether the men worked as a union group or not. He suggested that they consider the advantages of joining the union and of not joining the union, and the advantages and privileges which they now had as not being members of the union. He also told them to consider the matter well and that they should have established in their minds their desires and wants (R. 205). It was stated by the men that no official action had as yet been taken as far as asking the union to be their representative (R. 206). Mr. Warden at this meeting reiterated his statement that he would assist them in any manner that he could; and Hathaway also stated he would work with the men in any way he could through Warden, such as supplying them with information that might be necessary for them to prepare a complete demand for more money (R. 206).

The meeting was concluded with the statement from those men that they would consider and let their superiors know at a later date their official desires (R. 206). After the meeting with Hathaway, Warden and the men went down to the instrument shop at Station B where a general conversation was had in respect to whether or not the men could receive an increase in salary.

The next morning, January 16, 1951, a conversation was had between some of the men, including Newsom and Warden. The men informed Warden that they had decided to go ahead with their efforts to join the union, and then a further conversation ensued with

Warden. What this conversation was is the only point upon which there is a conflict in the evidence. Newsom testified that Warden said that the position of the men did not look too good and that if he were in their shoes he would "get these affairs in order" because there was a possibility that they would all be looking for other work. Newsom further testified that Warden asked if the men considered themselves able to compete in the field as instrument technicians and that he, Warden, didn't believe they could and that the men were going to encounter some strong opposition in their move to organize (R. 114). Warden denies that he made this statement or anything similar. Fowler gives an entirely different version of the conversation, and Shroble and Webb give rather evasive corroboration to Newsom. This conversation is one of the very important issues in the case and will be elaborated on hereafter in this brief.

Joseph L. Kalins, the Efficiency Engineer for the Company (R. 323), had been preparing a training program, and on January 30th, 1951, attended a meeting in the office of Mr. Hathaway to consider this training program. This was also a weekly departmental meeting which was usually attended by the station chiefs and Mr. Hathaway, Superintendent of Production. In this particular case Warden and Kalins were also present. They presented a program for the training of instrument men and explained the need for this training. It was then discussed in open meeting from various angles as to the time to be allotted to the meetings, who should be instructors and the type of in-

struction that should be given. It was finally decided that the presentation as given by Kalins was correct and that they would proceed accordingly and have two meetings a week, one hour on Company time and one hour overtime (R. 366). There were present at the meeting, Mr. Hathaway, Superintendent of Electric Production, Walter S. Zitlaw, Station Chief at Silver Gate, Kenneth Campbell, Station Chief at Station B, Kalins, Efficiency Engineer, and Warden, Instrument Engineer (R. 211).

Newsom's name was mentioned after Mr. Hathaway's question came up as to how the men were doing in the department. One of them replied that all were doing fine except Newsom (R. 211). Then Hathaway asked each man in the group about Newsom, as to whether or not his work was satisfactory following the occurrences in the past (R. 366). Each person present explained his opinion that Newson was not a satisfactory man, and that the Company should not waste time or the time of other men or the training instructors in the course; that he could not be left out of the course as an instrument man and that he should be offered the opportunity of a transfer and if he didn't choose to be, then terminated (R. 367). Each man was asked the question: Should we terminate Newsom? Hathaway asked each individually and the answer from each, given individually, was that he should be terminated or offered transfer (R. 367 and R. 211). Thereupon Hathaway instructed Kalins to give Mr. Newsom notice to that effect.

Further evidence of the unsatisfactory nature of the work of Newsom prior to January 1, 1951, was testified to by seven superiors of Newsom at the hearing, and this testimony will be later quoted.

On January 31st, Mr. Kalins called Mr. Newsom to his office and read to Mr. Newsom certain notes which he had written down on the papers as the reasons for his discharge. After Newsom demanded a further hearing before the other instrument technicians, they were summoned to Kalins' office and the matter further discussed. Kalins then told Newsom that he could transfer to some other department by making appropriate application with the Personnel Department but that his termination in that Department would be effective February 14 (R. 338). Newsom did not answer directly but said he would give his answer the following day; and did not again communicate with Kalins until the last day, and on February 14 Kalins bid him goodbye (R. 338).

At the hearing before the Examiner, Harold L. Warden, the immediate superior of Newsom, and Instrument Engineer, testified to the many reasons extending over a period of time from October 1949 why the work of Newsom was unsatisfactory, and that he had been warned (R. 193-201). Records of the Company, showing sloppy work and carelessnesss in his work on the instrument records was also presented by one of them. John T. Hardway, former Efficiency Engineer for the Company and at the time of the hearing a Lieutenant Commander in the United States

Navy, also testified as to the inefficient work performed by Newsom, beginning in June, 1950, and also as to his criticizing Newsom directly after hearing complaints from Warden (R. 292-298). B. L. Stovall, formerly Efficiency Engineer of the Company and at the time a Lieutenant Commander in the United States Navy, stationed at San Diego, stated that he had complaints from the Operating Department to the effect that Newsom was doing inefficient work, and himself observed that Newsom was given to horseplay, wasting time in conversation, lack of initiative (R. 313-317). Joseph L. Kalins, Efficiency Engineer at the time of the termination of Newsom's employment testified that he first questioned Newsom's ability in May or June of 1950 and discussed the matter with Newsom thereafter. Later he had several complaints from Warden and went over the same with Newsom (R. 325-331). He gave Newsom at the time of his termination, grounds of complaint in substance as follows:

(1.) That he does not have ability to get along with his supervisors;

(2.) That he had no desire to become a lead to set the pace for other men or show leadership, does not produce in accordance with ability;

(3.) He was producing a measured output to just barely get by;

(4.) That his workmanship was unsatisfactory and sloppy and jobs were uncompleted and he had no dependability;

(5.) He did not fit into the department set-up.

These reasons were discussed in detail, enlarged and some examples given (R. 335).

Charles R. Hathaway, Superintendent of Electrical Production, testified that he heard numerous complaints about Newsom from early in 1950 and from various supervisors.

Kenneth Campbell, Station Chief at Station B, testified that he received repeated complaints prior to May, 1950 as to the work of Newsom and that it continued to be unsatisfactory. After May, 1950 it was still unsatisfactory and spasmodic and that it was for the best interests of the Company to terminate him.

Walter S. Zitlaw stated that he was Station Chief of Silver Gate; that he had heard numerous complaints about Newsom and noted that his work had become lax. The general opinion after observation of Newsom was that he was unsatisfactory and inefficient and should be terminated. (R. 397-400).

Every one of these witnesses testified emphatically that the union activity of Newsom had no part and was given no consideration in arriving at the conclusion to terminate him.

2. The Pleadings.

After taking statements from Newsom and his associates, the Petitioner filed a complaint in which it charged the Respondent with the following:

A. Advising its employees that the union and concerted activities placed their business in jeopardy;

B. Advising its employees that they could receive no benefits through the union;

C. Threatening employees with loss of privileges should they persist in union and concerted activities;

D. Promising greater benefits to employees and continued privileges as inducements to employees to cease their union activities (R. 2, 3).

Respondent insists that none of these charges was proven.

The Trial Examiner filed his findings and concluded that the Respondent had been guilty of the discrimination charge and recommended that Newsom be reinstated. These findings (R. 8-35) are not in form encountered in the ordinary court proceedings in the State and Federal courts. The findings are not numbered so that they can be easily identifeid and discussed, and the findings of fact and conclusions of law are mixed together, causing confusion to the attorneys. The findings are also closely interwoven with argumentative matter by the Trial Examiner. It will also be observed that the Examiner finds that none of the witnesses of the Respondent are worthy of belief but that Newsom was a convincing witness. Counsel for Respondent filed a detailed statement of exceptions to the intermediate report and recommended order of the Trial Examiner, and these exceptions are in detail (R. 37-81). Attached to said exceptions is an ap-

pendix giving a summary of the evidence of the witnesses for the respondent (R. 81-92). These detailed exceptions and summary are referred to for the purpose of calling the exceptions to the attention of this Court, but are not repeated here in order to shorten this brief.

The Petitioner rendered its decision upon the objections filed and upheld the decision of the Trial Examiner.

3. Misstatements of Fact in Petitioner's Brief.

Counsel for the Petitioner by downright misstatements of fact in Petitioner's Brief and by picking out short quotations from testimony presents an entirely erroneous statement of the case. This Court should note these statements and discard them at the beginning of its consideration of this case.

An outstanding instance of the false statement of the evidence appears at Page 3 of Petitioner's brief where it is said:

> "Hathaway at once requested that the instrument technicians be brought to his office."

This statement is presented in this manner so as to mislead this Court into believing that Mr. Hathaway ordered or compelled in some manner the instrument technicians to be "brought" to his office. The use of the word "brought" is intentional and would, if unanswered, mislead this Court on one of the important elements of this case. Nowhere in the evidence does it appear that Mr. Hathaway used this term or any-

thing similar. The references to the record do not justify the statement. As appears at Page 203 of the Transcript of Record, the testimony of Warden is as follows:

> "I went to Mr. Hathaway and talked to him about that and Mr. Hathaway said if the men desired a meeting with him, that he would be very happy to arrange such a meeting.
> I came back from Mr. Hathaway's meeting with Kalins and I talked to Mr. Webb and Mr. Botwinis and explained to them what Mr. Hathaway had offered but had not requested. It was an offer of openness on the part of Mr. Hathaway that if the men desired a meeting he would like very much to talk with them, but Mr. Hathaway's instructions to me was not to make that a form of request from him."

No one has testified anywhere that Mr. Hathaway requested that anybody be "brought" to his office. This is quite important.

Another false impression is created by counsel in quoting only a small part of the statement of the witness. It is said at Page 9 of the Brief by counsel:

> "John T. Hardway, respondent's Efficiency Engineer until the end of August 1950 when he reentered the United States Navy, testified that on the date he left there was not sufficient reason to discharge Newsom." (R. 298)

What Hardway really said appears from R. 298 as follows:

"Q. During the period that you were Efficiency Engineer, you had occasion to observe the work of Newsom and the general attitude of his superiors, did you not, towards him and opinion of his work?

A. Yes.

Q. And did you come to a conclusion before you left as to what should be done about Mr. Newsom?

A. Yes, I did, but I got my orders too soon to carry them out.

Q. Did you think up to that time that the character of his work permitted either a termination of his employment or a termination so far as the instrument department is concerned . . .

Q. (By Mr. Luce) In your opinion was the character and quality of Mr. Newsom's work at the time you left sufficient to warrant his dismissal? . . .

THE WITNESS: I won't say it was that bad, but I will say it was unsatisfactory enough that I would have gone into a rather detailed investigation. I would have taken the time myself to have gone into a greater detail, which otherwise was not warranted, and would have come to a final conclusion then whether his removal was justified."

This is an entirely different statement of the evidence than claimed by counsel at Page 9.

Counsel at Page 12 in his brief claims that Warden's statement was "interpreted" by the men as a threat. Certainly the interpretation given remarks

by the men involved is no evidence at all against the Respondent.

On Page 4 of his brief, counsel again uses his own construction of the evidence in an attempt to give an entirely incorrect inference.

Counsel also quoted Hathaway as saying, "that the Company might have objections to their joining the Union because of the nature of their jobs. It was pointed out in this regard that some of the technicians' work was 'confidential.'"

The testimony itself referred to appears at R. 111. This is the testimony of Newsom himself:

> "He (Hathaway) said there are possibly advantages to not belonging to the union that you men are not aware of, that is what he said. He went on to say perhaps we weren't eligible to join the union because some of our work might be classified as confidential.
>
> He said that certain classes of employees, such as supervisors, office personnel and plant guards are not allowed to join the union, and that we might fall into a similar category."

This is an entirely different set of facts than counsel has inferred in his statement on Page 4.

II.

QUESTIONS PRESENTED

The questions presented or points at issue are rather simple and comprise the general question of whether or not the Order is supported by substantial evidence. It may be stated more in detail as follows:

1. That the findings and Order are not supported by substantial evidence in that there is no substantial evidence that the cause of the discharge of Newsom was union activities or that his discharge was even motivated by union activities.

2. That the findings and Order are not supported by substantial evidence even though the conflict in regard to the statement made by Warden is resolved in favor of Newsom.

3. That the Trial Examiner and the Board have drawn erroneous inferences from the evidence.

4. That the support of the findings in the evidence requires a review by this Court of the evidence in the case.

III.

EVIDENCE RELIED UPON BY PETITIONER TO SUPPORT FINDINGS AND ORDER

It is apparent from the brief that the Petitioner relies upon some very unsubstantial evidence to support its Order. The elements relied upon are these:

1. Time of Discharge.

It is conceded that the termination of Newsom occurred two weeks after he had announced that the instrument technicians were about to seek union membership. In answer to that, it appears clearly from the evidence of Warden, Hathaway, Hardway, Campbell, Zitlaw, Stovall, and Kalins that the work of Newsom had been unsatisfactory for some time and that there was sufficient ground to justify his discharge. It also appears in the evidence that the discharge was decided upon on January 30 because that was the beginning of a training program and he was not qualified to take it. The time of the discharge might raise a suspicion but that is all, and numerous cases which will be hereafter cited hold that the evidence is not sufficient to support an order when it is only enough to raise a suspicion.

2. Warden's Statement.

In respect to the statement of Warden the Instrument Engineer, upon which the whole case of the Petitioner really rests, it must be entirely disregarded as a matter of law, even though it be said that there is evidence to support a finding that the statement was made by Warden.

It must be borne in mind that Warden was only an Instrument Engineer and as such would not have authority to bind the Respondent. Cases will be later cited that hold the evidence for the contention of Newsom that Warden made such a statement, is unsubstantial. Newsom testified that Warden said:

> "A. Mr. Warden said that our position didn't look too good, and that if he were in our shoes he would get these affairs in order because there is a possibility we may all be looking for other work.
>
> MR. LUCE: Wait just a second. Let's get that down.
>
> THE WITNESS: He also asked us if we considered ourselves able to compete in the field as instrument technicians. He said he didn't believe we could.
>
> He said we were going to encounter some strong opposition in our move to organize, and I told him that—
>
> TRIAL EXAMINER MYERS: Did he say by whom?
>
> THE WITNESS: No, sir, not to my recollection.
>
> TRIAL EXAMINER MYERS: What did you tell him before I interrupted you? You said 'and I told him—'
>
> THE WITNESS: Well, I told him that as far as looking for another job was concerned, my method would be to complete what we had started, meaning our move to organize; that I would carry that through and then look for another job if my

position there was untenable. That is about the sum of it."

Even if it be assumed for the purpose of this argument that this statement was made, it is exceedingly indefinite as to what was meant, and it certainly is not binding upon the Respondent as will be shown by numerous decisions hereinafter quoted.

However, Warden denied making the statement or anything similar or with similar meaning. (R. 208, 209). Even Fowler, one of the technicians involved and a witness called by the Petitioner, gives an entirely different version of the conversation with Warden. He testified:

"Q. Then he said he hoped you were getting your affairs in shape.

A. Yes.

Q. Then you said you assured him you were prepared to look for other work.

A. Yes.

Q. He didn't say to you that you better be prepared to look for other work.

A. No, sir." (R. 187)

With the help of the trial examiner the witness construed the conversation to mean that he might lose his job over the union activity. However, further examination of the evidence (R. 186-188) indicates that Warden, according to Fowler, did not make the statement charged to him by Petitioner. The interpretation given it by the witness certainly is not evidence

supporting the Order. The other witnesses, Webb and Shroble, were rather vague in their statement of the conversation.

3. Other Evidence Claimed to Support Order.

Outside of the time of the discharge and the statement of Warden, there is no substantial evidence of any kind to support the inferences drawn by the Trial Examiner and the Board in the findings as will be noted above. Reliance is had upon misquotations and misinterpretations by counsel. The inferences drawn by the Trial Examiner and the Board are not in any way binding upon this Court and this Court can draw its own inferences if they have reasonable support. As Respondent claims, the Order is only "buttressed" (Language of the Trial Examiner) by inferences and not by evidence.

IV.

RULES OF LAW GOVERNING THIS COURT IN THE CONSIDERATION OF THE QUESTIONS HERE INVOLVED

1. Inferences Drawn by Petitioner Are Not Binding Upon This Court.

As has been heretofore pointed out, it is not in reality the evidence that the Petitioner claims supports these findings and Order, but it is the inferences which the Trial Examiner and the Board have drawn from the evidence. In other words, it is the claim of the Petitioner that this Court is bound by the findings and Order because they are based upon substantial evidence. It is the law, however, that this Court is not bound by inferences drawn from that evidence by the Trial Examiner or the Board. This is very clearly pointed out in the case of *American Tobacco Co. vs. Katingo,* 194 Fed. 2d, 451, where the Circuit Court, 2nd Circuit, held the rule to be as follows:

> "We are not required, however, to accept a trial Judge's findings based not on facts to which a witness has testified orally, but only on secondary or derivative inferences from the facts which the trial Judge directly inferred from such testimony. We may disregard such a finding of facts thus derivatively inferred, if other rational derivative inferences are open. And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony."

This is a very important distinction and applies particularly to this case where the Order is founded

wholly upon inferences which the Trial Examiner and the Board have drawn from evidence which is reasonably subject to an entirely different inference.

2. The New Rule Requires This Court to Weigh Testimony.

There is an extension of the field of review by the amendments to the Taft-Hartley Act which greatly broaden the field of review of this Court. One of the principal cases to this effect is that of *Pittsburgh S. S. Co. vs. N. L. R. B.,* in the United States Circuit Court of Appeal, 6th Circuit, 180 Fed. (2d) 731. The following quotation indicates the new rule:

> "The Board concedes that the review in this court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. We think this contention is erroneous. The provisions of §10(e) of the Administrative Procedure Act that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be 'unsupported by substantial evidence' and that in making this determination the court shall 'review the whole record,' is new. Moreover, the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act. Section 10(b) of the Wagner Act provided that 'rules of evidence prevailing in courts of law or equity shall not be controlling,' and the Board's findings of fact were made conclusive by that statute [§10(e)] if they were 'supported by evidence.' In the Taft-Hartley Act [§10(b)] Congress eliminated this language and substituted a provision that hearings

'shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.' Section 10(c) of the Wagner Act was amended to require decisions of the Board to be supported by 'the preponderance of the testimony taken,' and §10(f) was amended to provide that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

This decision is affirmed by the Supreme Court of the United States in 340 U. S. 498; 95 L. Ed. 479.

Another very recent decision of the Supreme Court bears directly on this rule of law. In *Universal Camera Corp. vs. N. L. R. B.,* 340 U. S. 474; 95 L. Ed. 456, that Court points out the broader field imposed upon the reviewing court in examining the evidence supposed to support an order of the National Labor Relations Board. That court concluded a rather lengthy discussion with the following:

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that

to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment."

In addition to the above quoted, there are other statements by the Court which clearly show that the whole field of court review of findings of the N.L.R.B. has been changed and broadened by amendments to the Taft-Hartley Act and by the Administrative Procedure Act. Therefore, prior decisions which limit the right of review of the reviewing court, should not be followed.

The courts also have lately emphatically held that the reviewing court should give a reasonable construc-

tion to what is known as the "substantial evidence rule" and make a careful examination of the evidence. In one of the late cases, decided by the United States Circuit Court of Appeals for the 10th Circuit, on March 21, 1951, *N. L. R. B. v. Tri State,* reported in 188 Fed. (2d) 50, it was pointed out that the reviewing court should not be "merely the judicial echo of the Board's conclusion." The decision, at page 52, contains the following language:

> Prior to *Universal Camera Corp. v. N. L. R. B.,* 71 S. Ct. 456, we had not thought that the change in the phraseology of Section 10(e), wrought by the Taft-Hartley Act, established any different standard of proof for determining whether the Board's order should be enforced. See *N. L. R. B. v. Continental Oil Company,* 10 Cir., 179 F. 2d 552. In making pragmatic application of the substantial evidence rule, however, we have always recognized our ultimate responsibility for the rationality of the Board's decision, keeping in mind the central idea that the Board in the first instance—not this court—has the primary function of administering the Act, to effectuate the manifest congressional purpose. See *Boeing Airplane Co. v. N. L. R. B.,* 10 Cir., 140 F. 2d 423; *Harp v. N. L. R. B.,* 10 Cir., 138 F. 2d 546; *N. L. R. B. v. Denver Tent & Awning Co.,* 10 Cir., 138 F. 2d 410; *Nevada Consolidated Copper Corp. v. N. L. R. B.,* 10 Cir., 122 F. 2d 587, reversed 316 U. S. 105, 62 S. Ct. 960, 86 L. Ed. 1305. And, since the amendatory Act did not purport to curtail the power of the Board to prevent proscribed unfair labor practices, and since 'no drastic reversal of

> attitude was intended' by the change in terminology in Section 10(e), we perceive that the net effect of the *Universal Camera Corporation* case is to quicken the disposition of the appellate courts to vouchsafe the integrity of judicial review. In other words, our application of the substantial evidence rule should not be 'merely the judicial echo of the Board's conclusion.' "

In a later case, decided by the same Court on July 5, 1952, *N. L. R. B. v. Machine Products Co.,* 198 F. (2d) 313, that Court was considering the same kind of petition by the same Petitioner as herein involved, and the Court there concluded its decision as follows:

> "While we are not unmindful of the Board's prerogative in weighing the evidence and judging the credibility of the witnesses, we are poignantly aware of our ultimate responsibility for the rationality of the Board's decision. See *N. L. R. B. v. Tri-State Casualty Ins. Co.,* 10 Cir. 188 F. 2d 50.
>
> When all the evidence is viewed in the context in which it was given, we are convinced that it does not support the Board's order, and enforcement is denied."

Even under the old rules, the courts have broadened the substantial evidence rule beyond the limits contended for by the Petitioner herein. It has been held repeatedly that the substantial evidence rule means more than a mere scintilla, and that the reviewing court is bound to review the evidence carefully to ascertain whether or not there is substantial evidence supporting the findings and the order.

A very pertinent decision is that of *N. L. R. B. v. Union Pacific Stages,* 99 F. (2d) 153, a decision handed down by this very Court on September 23, 1938. It contains a great deal that is applicable to the case before us. The following short quotation is particularly pertinent to the point under discussion:

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistences, and erroneous inferences are immune from criticisms or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A., §160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.
>
> "'We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U. S. C. A. §160(e) (f); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. . . . Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. *Pennsylvania R. Co. v. Chamberlain,* 228 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.' *Appa-*

lachian Electric Power Co. v. N. L. R. B., 4 Cir. 93 F. 2d 985, 989.

"'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and considering them in their entirety and relation to each other, arrives at a fixed conviction.

"'The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injuctices be wrought.' *National Labor Relations Board v. Thompson Products, Inc.,* 6 Cir., 97 F. 2d 13, 15."

One of the many cases involving this proposition of law rests upon facts very similar to those in this case. It is the case of *Hazel-Atlas Glass Co. v. N. L. R. B.,* Circuit Court of Appeals, 4th Circuit, 127 F. (2d) 109, and that Court said at Page 117:

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion', *Con-*

solidated Edison Co. v. National Labor Relations Board, supra, [305 U. S. 197, page 229], 59 S. Ct. [206], 217 [83 L. Ed. 126], and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *National Labor Relations Board v. Columbian Co.,* 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660.55

V.

THE EVIDENCE MUST MORE THAN RAISE A SUSPICION

It has been repeatedly held that in order to justify an order reinstating an employee, the evidence relied upon must be more than a mere scintilla and must raise more than a suspicion. In the case at bar the evidence, at the most, raises only a suspicion. Nowhere is there the slightest evidence directly involving any representative of this Company in any words or acts which would indicate that the discharge here in question was for union activity. It may be true that a discharge two weeks after the union activity might raise a suspicion. But that is not sufficient. At the outset it must be remembered that only the one man out of five involved in the activity was discharged, and he was not the leader or spokesman, and his record otherwise justified his discharge. The courts have had occasion frequently to warn the reviewing courts against upholding an order where the supporting evidence raises no more than a suspicion. The rule cannot be more clearly stated than it was by the Circuit Court of Ap-

peal, 4th Circuit, in *Appalachian Electric Power Co. v. N. L. R. B.*, 93 F. (2d) 985, 989:

> "We are bound by the Board's findings of fact as to matters within its jurisdiction, where, the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U. S. C. A. §160(e) (f); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. . . ."

In a later decision, by the Circuit Court of Appeals, 6th Circuit, *N. L. R. B. v. Thompson Products, Inc.,* 97 F. (2d) 13, 17, the court took occasion to say that interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in in applying the National Labor Relations Act, and warns against promoting discord between employer and employee by upholding an order based only upon a scintilla of evidence. That Court said:

"Interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Labor Relations Act and, where the employee admits he is performing his work negligently, the evidence should be strong and convincing that he was discharged for union activities before reinstatement by an administrative board.

"There is a scintilla of evidence in this case that the union activities of the three employees were factors in their discharge but, from their own testimony, the employer would have been justified in discharging them had there been no effort to organize its employees in a union. The Board's finding in this case tends to destroy the purpose of the Labor Relations Act and to promote discord between employer and employee instead of harmonious and joint discussion of their difficulties, and is not sustained by substantial evidence. The petition will therefore be denied and decree entered accordingly."

The same rule is followed by the Circuit Court of Appeals, 5th Circuit, in *N. L. R. B. v. Bell Oil & Gas Co.,* 98 F. (2d) 407, 410. As a part of its decision, that Court said:

"Since there is nothing in the statute indicating an intention to modify the rules of evidence prevailing in courts of law or equity, they are controlling in this case. The evidence to support a finding of the Board should furnish a reasonably sound basis from which the facts in issue may fairly be inferred. A good rule for weighing the evi-

> dence to ascertain whether it is adequate for the purpose mentioned is to compare it with the evidence necessary to sustain the verdict of a jury upon a similar issue. Such evidence must be substantial. A scintilla of evidence which creates a mere suspicion, or evidence which gives equal support to inconsistent inferences, is not sufficient. *Appalachian Electric Power Co. v. National Labor Relations Board,* 4 Cir., 93 F. 2d 985."

While there are numerous other cases, the above are sufficient to establish the rule peculiarly applicable to this kind of case. All decisions above quoted are in cases brought by the N. L. R. B. It needs no argument here to convince this Court that it was never intended by Congress that the N. L. R. B. should have the right to interfere with the discharge of employees by employers unless a violation of the statute is established by really substantial evidence and by more than evidence creating a mere suspicion. Applying the above rules to the evidence here, it will immediately appear that even the evidence, as cited in Petitioner's brief, falls far short of being substantial in the true sense. More than that, however, after this Court has considered the evidence produced here by Respondent, it will conclude that the order is based upon the weakest kind of evidence and inferences, and that the Trial Examiner has not given any fair consideration at all to the evidence presented by Respondent.

Counsel has pointed out above that the findings are supported only by conjecture and suspicion, and the

preponderance of the evidence is contrary to the findings. An example of suspicion is the emphasis that the Trial Examiner places upon the time of the discharged Newsom as coinciding with his union activities. Other findings also seem to be based on suspicion. But it is well in considering this matter to keep in mind the other rulings of the Circuit Courts of the United States.

Several times the Circuit Courts have held that any order, to be enforceable, must have the support of substantial evidence and must not be based on surmise or suspicion.

> "Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and *surmise or suspicion, even though reasonable, is not enough. . . .*" *National Labor Relations Board v. Williamson-Dickie Mfg. Co.,* 130 Fed. (2d) 260, 263.

In the above cited case there is a further expression of the United States Circuit Court of Appeals, Fifth Circuit, that bears repetition:

> "In view of the very large powers and wide discretion granted by the Act to the Board and the grave consequences of an abuse of these powers and this discretion by the Board, we cannot, in the exercise of our function in refusing to enforce

those which are not, too often repeated, that it has not been given to the Board to substitute its own ideas of discipline and management for those of the employer. It has not been given to it to supervise and control, except as precisely set out in the Act, or set standards for, the supervision and control of employee and employer relations." Page 267.

In several other cases the Courts have repeated the rule. Here follows a few instances:

N. L. R. B. v. Tex-O-Kan, Etc., 122 Fed. (2d) 433, 438;

N. L. R. B. v. Goodyear, Etc., 129 Fed. (2d) 661, 664;

Magnolia Petr. Co. v. N. L. R. B., 112 Fed. (2d) 545, 548.

Another decision of the Circuit Court of Appeals of the Fifth Circuit points out the care that should be taken by the Board to make its order legal, and to base its decisions on sound evidence. In *National Labor Relations Board v. Goodyear Tire and Rubber Co. of Alabama,* 129 Fed. Rep. (2d) 661, 664, that Court said:

"Accepting the preliminary fact findings of the Board as correctly found as to each, we think it clear that under the controlling principles of law its ultimate finding in each case, except that of Parker, is wholly without support in the evidence. Taking them individually and as a whole, the ultimate findings or inferences of the Board were based on nothing more than that the evidence

showed antipathy to United, and the persons discharged in each case for an assigned cause, were members of or applicants for membership in United. This will not at all do. Nothing is better settled in the law than that while discharges may not be made because of and to discourage union membership or activity, membership in a union, is not a guarantee against discharge, nor does the fact alone, that an employer dislikes a union or a union man, prevent his exercising his undoubted right to discharge. Findings of the Labor Board just as findings of a jury, must rest upon evidence, not surmise or suspicion, *Magnolia Petroleum Company v. N. L. R. B.*, 5 Cir., 112 F. (2d) 545. It is only fair to say however that the confusion of law in the mind of the Board, that antipathy toward a union once shown to exist, is all the evidence needed to convict of a discharge as an unfair practice, is a natural one. It arises from the fact of the Board's dual relation to the charge. Its right hand accusing, its left hand hearing as a judge, it is the most natural thing in the world for the Board to sometimes forget that as accuser it must make, as judge it must have, not surmise but proof, of the facts on which a finding of unfair practices is to be based. Quite natural too is it that occasionally the suspicion, surmise, feeling and conviction which give legitimate force and vigor to it as prosecutor, should, in its dual capacity, be allowed to suffice for proof. But this of course will not do. For the Board as accuser must furnish to itself as judge, proof in such amount and quality, that one having no interest whatever as accuser and interested only in a just result,

could reasonably draw the inferences of guilt which as accuser, it belabors itself as judge to draw."

VI.

THE BURDEN OF PROOF

One thing that seems to have been entirely overlooked by the Trial Examiner and the Board is that the burden of proof was upon the general counsel and individual employee and not upon the Respondent. This rule of law should be strictly followed, particularly in this kind of a case.

In considering the contentions here made by the respondent employer and in determining whether or not the evidence justifies the findings of the Trial Examiner, this Court should consider the rules of law that govern a proceeding such as this and the final determination of the National Labor Relations Board. It is undisputed that the Employer in this case has the absolute right to discharge an employee for any cause whatsoever except only for union activity. This rule needs no citation, but it will be found stated in the case of *National Labor Relations Bd. v. Tex-O-Kan Flour Mills Co.,* 122 Fed. (2d) 433, 438:

> "So far as the National Labor Relations Act, 29 U.S.C.A., Sec. 151 et seq., goes, the employer may discharge, or refuse to reemploy for any reason, just or unjust, except discrimination because of union activities and relationships. . . . "

Another cardinal principle which must be borne in mind is that the presumption is that the employer has not violated the law and the burden of proof is therefore not upon the employer, but upon the one who asserts the fact, to prove that the discharge was because of union activity.

> "It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities. The presumption is that the employer has not violated the law, and the burden of proof is not upon the employer, but upon the one who asserts the fact, to prove that the discharge was because of union activities. . . . " *N.L.R.B. v. Union Mfg. Co.,* 124 Fed. (2d) 332, 333.
>
> "In sponsoring the charges of Oil Workers' International Union, No. 243, and issuing its complaint thereon, the Board was acting purely in its accusatorial capacity and in that capacity it, of course, had the burden of proof to establish before itself, in the capacity as trier, the accusations it had laid. In its capacity as accuser, the Board like any other 'person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor.' It cannot any more than any other litigan can, 'leave the right of the matter to rest in mere conjecture and expect to succeed.' *Samulski v. Menasha Paper Co.,* 147 Wis. 285, 133 N. W. 142, 145."
>
> *Magnolia Petroleum Co. v. National Labor* Relations Bd., 122 Fed. (2d) 545, 548.

Therefore, the Petitioner would not have the power to order reinstatement in this case, unless the burden of proof had been met by the accuser and the fact established by clear and convincing evidence.

Counsel regards this rule of law as having an important bearing upon the decision herein. The Board should not render a decision supported by law unless it gives the presumption of honest dealing and of obedience to the law to the Respondent, and requires its accuser to assume the burden of proof and to prove the case by preponderance of the evidence.

In another case, *N. L. R. B. vs. Ray Smith Transport Co.,* 193 Fed. (2d) 142, 5 Cir. (1951), the facts were: One truck driver, Hillin, asked another, the dischargee Bain, about the latter's attempt to organize respondent's employees, and who was among this group of organizers. Bain alone testified as to this conversation. The Board then made several inferences, not grounded by testimoy, that Hillin communicated this information to his employer, and further inferred that the employer discharged Bain and others for this activity. The court said at p. 144:

> "Turning to the evidence in respect of the discharge, because they are the gravamen of the Board's case, indeed they are the pivot on which it turns, it is at once evident that, to the mind of the examiner, the burden was not on the Board to prove that they were for union activity, but on the Respondent to prove that they were for cause, and also that, to his eager credulity, straws in the

wind, offered in support of the Board's case, became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ.

". . . It was this attitude, and this alone, which enabled the examiner to disregard and discredit the positive testimony, not only of every employee of the Respondent, but of disinterested witnesses, customers of the Respondent, who testified positively to the discourtesies to them for which Bain and Veazy were discharged."

Again at page 146:

"The findings were contrary to the law, because as we pointed out in *N.L.R.B. v. Fulton,* 5 Cir., 175 Fed. (2d) 675, 290 U.S.C.A. §160(c) prohibits the Board from requiring the reinstatement of any individual, 'if such individual was suspended or discharged for cause', and because as we pointed out in the same case 'this court, before the amendment of the National Labor Relations Act, held without varying that membership in a union is not a guarantee against discharge and that when real grounds for discharge exist, the management may not be prevented because of union membership from discharging."

This is another case that directly applies to the facts in the case before us.

VII.

PETITIONER ERRONEOUSLY RELIES ON STATEMENT OF WARDEN

The statement of Warden, the Technical Engineer heretofore referred to, has been erroneously relied upon by the Petitioner. The decisions on this very point of the Circuit Courts require that this statement be wholly ignored, because the statement of a supervisory employee is not binding upon his employer, and therefore is not in any way controlling in this case or binding upon the Respondent. This would seem to be obvious, but it has been ignored entirely by the Petitioner and therefore a few cases will support our above statement.

Mr. Warden was at the time an instrument engineer (R. 189). There is no evidence that he was authorized to make the statement by anyone in authority. It was wholly on his own, if made at all. He is pretty well down the list in the chain of command and certainly without further proof he has no authority to bind his employer, the Company. He was only one grade above Newsom, being an instrument engineer as against an instrument technician. It might as well be said that statements of Newsom or Fowler are binding upon the Company and commit it to a policy. For the moment, disregarding the contradictions and the lack of clear proof of the statement attributed to Warden for the purpose of this argument alone, we can assume that the remarks were made as claimed by Newsom. The following rules of law will therefore apply. These cases are cited and a brief summary of the facts included:

N. L. R. B. v. Tennessee Coach Co., 191 Fed. (2d) 546 (C. A. 6th Cir., 1951). An assistant superintendent asked an employee how their negotiations to join a union were going; the worker responded that they "would go in for 90%". The superintendent then said that he woud hate to see it go through, and that if it did the president of the coach company "would sell out to big Greyhound and it would ruin them." Similar statements were subsequently made by this same superintendent. The court, at Pages 554-555, said:

> "Whether acts of supervisory employees constitute restraints upon union activity on the part of a company must be viewed to a large extent, against the background of the company's attitude, policy and practice in the past with regard to such matters. Where an employer has no history of labor trouble or union hostility, and repeatedly advised its employees, in unmistakable terms, that they might, without fear of reprisal, exercise freedom of choice in their actions and opinions on labor matters, expressions of union hostility by some of the supervisory employees are to be regarded as the individual views of such employees, rather than as the views of the employer (citing cases). Isolated or casual expressions of individual views made by supervisory employees, not authorized by the employers, and not of such a character or made under circumstances reasonably calculated to generate the conclusion that they are the expression of his policy, fail to constitute interference with the employees in the exercise of their right of self-organization. (citation); and in

a labor controversy, where a general manager of a corporation told the employees that they would get nothing from joining a union, and that it was organized by racketeers, together with other similar statements, all of which were made without threatened, coercive, or punitive action, it was held that such statements were within the right of free speech. *Jacksonville Paper Co. v. N. L. R. B.,* 5 Cir., 137 Fed. (2d) 148. In *N. L. R. B. v. Hinde & Dauch Paper Co.,* 4 Cir., 171 Fed. (2d) 240, where it appeared that a foreman had inquired of an employee how she intended to vote, and stated to another employee, that if the plant was organized, the owner woud close it down, the court denied enforcement of the Board's order based on such statement and inquiry, on the ground that there was nothing to show that they were made with the approval of the management or that they constituted part of a program of intimidation."

N. L. R. B. v. Hart Cotton Mills, 4 Cir., 1940 Fed. (2d) 964 (1951): Here a supervisory employee told 8 out of 557 striking employees that if the striker would go back to work at the request of the corporation, his job would be easier than if he went at the direction of the labor union, or that the striker would get his vacation pay, or that payment of compensation for injury would be facilitated or that if the striker did not return, his job would be filled by another and that the union would never get a contract. The Court said, at page 974:

"An employer's responsibility for the acts of his supervisor is not determined by applying principles of agency or respondent superior but by ascertaining whether the conduct or activity is condemned by the Act."

". . . isolated statements by supervisors contrary to the proven policy of the employer, and neither authorized, encouraged nor acquiesced in by him, do not constitute substantial evidence of interference or coercion."

N. L. R. B. v. West Ohio Gas Co., 6 Cir., 172 Fed. (2d) 685 (1949): Here one employee alleged that the general superintendent had said to him something to the effect that "there would never be a union around any company where the superintendent worked." The incident occurred while a decision was pending whether the employees of the defendant corporation were to withdraw from their union, petition for withdrawal having been prepared through the assistance of the employer. The court said, at page 688:

"assuming it (the statement) had been made, there was no evidence that it was coupled with any threat against any employee or organization. Such an isolated statement, in absence of circumstances evidencing coercion, does not constitute violation of the statute (citing cases)."

Sax v. N. L. R. B., 7 Cir., 171 Fed. (2d) 769 (1948): Three workers were asked by one supervisor if they were for a union and why; and another supervisor

made similar remarks to another worker. At page 733, the court said:

> "Mere words of interrogation or perfunctory remarks, not threatening or intimidating in themselves, made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees, cannot, standing naked and alone, support a finding of a violation of Section 8 (1)."

Similar language may also be found in the following cases which are less closely related to the San Diego Gas and Electric Company case than are those cited above.

N. L. R. B. v. Arthur Winer, Inc., 7 Cir., 194 Fed. (2d) 370 (1952) which at page 372 quotes *John S. Barnes Co. v. N. L. R. B.,* 7 Cir., 190 Fed. (2d) 127, 130 (1951) where it was said:

> "However the courts have not considered isolated remarks or questions which did not in themselves contain threats or promises, and where there was no pattern or background of union hostility, as coercion of the employees and as a violation of Section 8 (a) (1)."

And in *N. L. R. B. v. Mayer,* 5 Cir., 196 Fed. (2d) 286 (1952), (which involved the remarks of an assisting friend of the employer rather than a supervisory employee) it was said at page 290:

> "In order to charge any employer with the acts of another for the purpose here under consideration, such person must be one who in fact and law is the employer's agent. Such person must act under the employer's control and direction, or under his orders, or, if the acts were originally unauthorized, they must be ratified, expressly or impliedly, before they can be attributed to the employer."

Other cases which should be considered are the following:

N. L. R. B. v. Reliable, etc., 187 Fed. (2d) 547, 552:

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the union."

In the case of *Indianapolis, etc. v. N. L. R. B.,* 122 Fed. (2d) 757, at 762, the court referred to a conversation with the chief engineer upon which the Board relied in support of its order. That court however refused to support the order on the ground that the evidence showed merely a conversation with the chief engineer and that the employer was not responsible for his actions.

In the case of *Balston v. N. L. R. B.,* 98 Feb. (2d) 758, at 762, which has been heretofore cited on another point, the court held that threats of supervisory employees were not binding upon the employer.

In a late case the Circuit Court of Appeals, 3 Cir., on April 17, 1941, in the case of *Quaker State Oil Refining Corp. v. N. L. R. B.,* 119 Fed. (2d) 631-633, said:

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union. The Board nevertheless found that the petitioner was responsible for the statements made by Healy and McElhatten and that thereby it interfered with, restrained and coerced its employees in the exercise of the rights of self-organization and collective bargaining guaranteed them by Section 7 of the National Labor Relations Act, 29 U.S.C.A. §157. We do not think that this finding is supported by substantial evidence. Isolated statements by minor supervisory employees made casually in conversation with fellow employees without the knowledge of their employers and not in the course of their duty or in the exercise of their delegated authority over those employees ought not to be too quickly imputed to their employer as its breach of the law. *N. L. R. B. v. Whittier Mills Co.,* 5 Cir., 111 F. 2d 474, 479. This is particularly so where, as here there is no evidence of any policy on the part of the employer to authorize or encourage opposition to union activity. *Martel Mills Corp. v. N. L. R. B., supra,* 114 F. 2d page 633."

In another late case the Circuit Court of Appeals of the 4th Circuit in the case of *N. L. R. B. v. Mathie-*

son, 114 F. 2d 796, 802, held that isolated casual speeches made by underlings having some authority are not binding upon the employer. The ideas are clearly their own.

Consequently the remarks attributed to Warden were clearly his own, and were an isolated casual conversation. From the context of the statement as described by Newsom it is clear that the remarks were only notions of Warden, if made at all. In view of the overwhelming authority cited above, these remarks are not in any way binding upon the Respondent. This being so, these remarks must be disregarded. Without them, the Petitioner has no case at all. He is left with nothing but a suspicion because of the timing of the discharge.

A reading of the findings will disclose that the Trial Examiner and consequently the Board repeatedly "buttressed" their findings on this statement of Warden; they rested their entire case upon it. Repeated references are made in support of the finding that Warden's remark was made, by reference to the evidence.

A good example is found at R. 30 where the Trial Examiner in his concluding findings says:

> "The undersigned further finds that by Warden's statement to Fowler, Newsom and Shroble on January 16, 1951, that they might lose their jobs if they continued their union activities, the Respondent violated Section 8 (a) (1) of the Act."

Never once does the Trial Examiner or the Board even question that such a remark by such an employee was binding upon Respondent.

VIII.

EMPLOYER HAS A RIGHT TO DISCHARGE FOR ANY CAUSE EXCEPT FOR UNION ACTIVITY

It is quite clear without citation that the employer has an unlimited right to discharge an employee for any cause so long as he does not do so for union activity. While this seems obvious, the tendency of the Petitioner is to disregard it entirely. In the first annual report of the National Labor Relations Board in 1936, at page 77, is found the following:

> "This section [Sec. 8 (a) (3)] is not intended to interfere with the freedom of an employer to hire and discharge as he pleases. It limits his freedom, however, in one important respect. He may not use it in such a manner as to foster or hinder the growth of a labor organization. He may employ anyone or no one; he may transfer employees from task to task within the plant as he sees fit; he may discharge them in the interest of efficiency or from personal animosity or sheer caprice. But, in making these decisions he must not differentiate between one of his employees and another, or between his actual and his potential employees, in such a manner as to encourage or discourage membership in a labor organization."

In the case of *Appalachian, etc. v. N. L. R. B.*, 93 Fed. 2d 985, the Circuit Court of the 4th Circuit

pointed out that the Labor-Management Act does not and should not interfere with normal acts of discharge or with the control of the business of an employer, and in that particular case discouraged the Board from extending its right to set aside discharges occurring in the ordinary conduct of business.

In the case of *N. L. R. B. v. Thompson,* 97 F. 2d 13, the Circuit Court of the 6th Circuit clearly pointed out that the Board should not interfere with the employer's prerogative to judge the inefficiency of its own employees. This rule is particularly applicable here. The Respondent is a very large public utility engaged in supplying electricity to a great city. The instrument technicians have a great deal of responsibility, and a great deal of confidence must be imposed in them or else the huge machines may break down causing great damage and discomfort to industry as well as to the people of the whole city. No one is better able to judge the efficiency of this employee than the technical men who have here testified, who are the station chiefs, the superintendent of production and the efficiency engineers who hold their positions after establishing years of experience. Their testimony and their judgment however have been entirely disregarded by the Trial Examiner and the Board. This very Court, in the case of *N. L. R. B. v. Union Pacific Stages,* 99 F. 2d 153, also declares itself on the same subject and holds that the Board should not be permitted to interfere with the judgment of the employer in normal cases.

IX.

UNION ACTIVITY DOES NOT PROTECT EMPLOYEE

If the Petitioner here is correct and the fact that the discharge occurred shortly after the appearance of union activity is substantial evidence supporting the Order, it would mean that union activity would always be used to protect the inefficient employee.

It should be obvious that the fact that at the time of the discharge the employee was engaged in union activity is not of itself sufficient to justify an order of reinstatement. An employee is not protected from discharge merely by the fact that he is engaged at the time of discharge in union activity. Otherwise, inefficient employees could not be discharged at all as they could insure their positions by indulging in union activity. It does not seem necessary to cite authority for such a proposition but courts have declared the law. In the case of *National Labor Relations Bd. v. Goodyear Tire and Rubber Co.,* 129 F. 2d 661, the Court made some pertinent remarks on this subject which will bear consideration. On page 665 of that report we find the following:

> "We and other courts have in many cases set down the rule which must guide the Board in deciding matters of this kind. In *N. L. R. B. v. Riverside Mfg. Company,* 5 Cir., 119 F. 2d 302, at page 307, we said of a discharge: 'The only facts found which at all tend to support the Board's conclusion that he was discharged for union activity are that he was a member of the union, and the manage-

ment did not like the union or his belonging to it, and had said so. If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them.'

"In *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 5 Cir., 122 F. 2d 433, 438, 439, we said: 'In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to re-employ in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which

> in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, and the ruling is applicable to the Board as fact-finder.' ''

This holding of the Circuit Court of Appeals is also very enlightening in that it considers the exact question that counsel for Respondent presents here, and we quote again this pertinent language:

> "If he says (Employer) it was not Union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."

As counsel has repeatedly insisted, the sworn testimony of the executives of Respondent cannot be disregarded because of the suspicion in the mind of the Trial Examiner that the cause of discharge was other than that stated by them.

X.

A WIDE LATITUDE SHOULD BE ACCORDED RESPONDENT IN THE MATTER OF DISCHARGE

It should be obvious without any discussion that the management of this great public utility should be allowed wide latitude in the matter of discharge of its employees and particularly of an instrument technician who works upon the great engines that develop the tremendous amount of electricity required to supply the inhabitants of this city. Mr. B. L. Stovall, now in the United States Navy and formerly engineering assistant and later junior engineer and efficiency engineer and assistant station chief at Station B, referred in the following language to the result of lack of confidence in the instrument technician: "It would result in apprehension on the part of the operators assigned to a particular boiler operation where tremendous quantities of fuel are involved and fires are 3,000 degrees hot and faults and variations must be instantly noted. The automatic controls of both stations have to take care of these fluctuations. If they don't the operators are in trouble and combustion is thrown completely off, with attendant smoke and the danger of explosion inside the plant itself. All of this depends upon good instrument technicians" (R. 318).

As stated by Mr. Hathaway, the Superintendent of Production, an instrument technician's work is very important in that he controls the operations of the nervous system of the production of the electricity for the community and the technicians handle the equipment that is used to determine the proper operation.

The operation itself is automatically controlled, which also does the operating of the largest unit in the system, so it is very important they be properly calibrated and in proper operating order. An instrument man is more or less in a key position in that he must not only do his work well and keep the instruments in perfect working shape but must coordinate his effort with the operating men and the maintenance men as well as the supervisors. It requires a man of good personality as well as good technical training. It is definitely a very important position. (R. 373, 374). In determining whether or not Mr. Newsom's employment should be terminated Mr. Hathaway, Superintendent of Production, submitted the matter to his two station chiefs, to his efficiency engineer, to his instrument engineer, and they all determined and unhesitatingly voted to terminate his employment on the ground that he was inefficient and unsatisfactory. They also testified that they were not influenced in the slightest degree by Newsom's union activity.

Now the Trial Examiner and the N. L. R. B., with no experience or technical knowledge whatsoever and without any responsibility to produce electricity whatsoever, set aside the considered judgment of these experts and substituted their own views upon a slight suspicion only. The testimony of these experts, plus the other efficiency engineers who have left the company's employment, was entirely disregarded by the Trial Examiner and dismissed with a wave of the hand and a statement that they were unworthy of belief. No impeachment or contradictions whatsoever of these

witnesses was shown in the evidence. Their experience and training was testified to, and establishes that they were men of unusual experience and training.

XI.

PETITIONER RELIES UPON LACK OF EARLIER DISCHARGE

The Petitioner herein relies in support of its Order upon its contention that the employer had retained Newsom in its employ for many months after finding inefficiency in his work and then chose to discharge him two weeks after his union activity appeared. By this reliance the Board takes the position apparently that the employer is estopped from discharging the employee after he engages in union activity, regardless of how bad his record might have been before that time. This has been argued heretofore.

In this case the testimony of all the witnesses for the Respondent was that since early in 1950 complaints had been made about the work of Newsom, and conversations were had with him by his supervisors in an effort to correct his "sloppy" work. Those in the best position to know, such as Warden, his immediate superior, complained of him repeatedly and stated that his work did not improve. There were two particular reasons why his discharge occurred when it did, besides incidents of his inefficiency. It did not occur earlier because the Company had completed the overhauling schedule for 1950, after having been very busy because of the damage to a turbine (R. 263); and fur-

ther, because the training program presented to the supervisors was to be taken up (R. 263). This program was put into effect shortly after the 1st of February, 1951. The training program was fully discussed at the meeting of January 30th in Hathaway's office, and in this conversation qualifications of Newsom came up for discussion (R. 332, 367, 370, 386). A very good statement of what occurred at the meeting of January 30th is contained in the testimony of Kenneth Campbell, Station Chief at Station B:

> "Q. Will you state what occurred at that meeting?
>
> "A. That was a meeting of the station chiefs and the department superintendents. During that meeting our work was interrupted, at which time Mr. Kalins and Mr. Warden came up to present a program, a request for a program on training of instrument men.
>
> "There was a general discussion of the values of the program and some discussion of the details of handling it. It was decided that the program would be put into effect, and after that was decided there was a question in regard to how the instrument men were getting along.
>
> "At this time it was reported by either Mr. Warden or Mr. Kalins, I am not sure which, that his work was still not satisfactory. There was a general discussion as to what should be done with him, and each man in the group had an opportunity to express his views, based upon his experience and judgment. It was decided that for the good of the entire department it was better if Mr. Newsom would be terminated.

"Q. Did you express your opinion at that meeting?

"A. I did.

"Q. Will you tell us what you said?

"A. I can't tell you exactly, but my opinion was that due to his inability to adjust himself to the conditions of the job, that he should be terminated from that department.

"Q. Now, were you actuated in giving that opinion by the fact that Newsom had been involved in union activity? Would that affect you in any way in the termination of any man, whether he had been in union activity or not?

"A. Not in the least.

"Q. Did you have union men working under you?

"A. Almost all the men are union men. We have exceptionally good relations with them.

"Q. You have no objections to union men.

"A. Not at all. I have been a member myself."

This Court, knowing that the burden of proof was upon the general counsel at the hearing and that the Respondent is presumed to comply with the law, and that nothing is in evidence to indicate that these witnesses were unreliable or dishonest or untruthful, should hold that the only possible finding that could have been justified under the evidence was that the discharge of Newsom was due to proper causes and not to union activity.

XII.

RESPONDENT'S RECORD OF LABOR RELATIONS WAS GOOD

In many of the cases decided by the Courts, an important consideration in considering the evidence is whether or not the employer had a good record of relations with the union. The testimony here shows that a large part of the men were members of the union and that the relations between the company and the union were excellent. Most of the witnesses for the Respondent had been members of the union, and all testified, as did Campbell above, that they had no prejudice whatsoever against the union and that the discharge was not in any way motivated by union activity. In respect to the relations with the union, Mr. Hathaway testified as follows:

> "Q. Mr. Hathaway, you say, then, in your department a large portion of the men are members of the union?
>
> "A. That is correct, yes.
>
> "Q. Is there any reason that you know of now, either in company policy or in your policy, that woud require you or would cause you to discharge a man because he was engaged in union activity?
>
> "A. Certainly not.
>
> "Q. To your knowledge, has it ever been done by your company?
>
> "A. It has not been done since I have been with the company, certainly not.

"Q. Has there ever been any discouragement given to the men to discourage them from joining the union?

"A. No.

"Q. Would you say that in deciding to terminate Mr. Newsom's employment that his union activity was in any degree a contributing factor?

"A. No, it was not." (R. 372).

The only instructions given by Mr. Noble, Assistant General Manager and the superior to Hathaway, were as follows:

"I told Mr. Noble these men had discussed representation by the union and that one of these men had not been satisfactory as an instrument man; that we had definitely decided that he was not good and would probably ask him to terminate.

"I asked him whether I should postpone the action until the end of the union negotiations or whether I should go ahead and act exactly as if the union negotiations had not been brought up.

"TRIAL EXAMINER MYERS: When was this?

"THE WITNESS (Mr. Hathaway): Sometime between January 15th and January 30th.

"TRIAL EXAMINER MYERS: All right.

"Q. (By Mr. Luce): Did Mr. Noble at any time advise you or instruct you to terminate Mr. Newsom's employment?

"A. Yes. He said if the man's work was not satisfactory, by all means to terminate him. He left the judgment up to the department, however, as to whether he was satisfactory.

"Q. And did you refer to his union activity as any reason why he should be terminated?

"A. No." (R. 371-372).

It must be also taken into consideration that no evidence at all was offered by the side upon which the burden of proof rested that there had been any indication of unfriendliness to the union or pressure against union activity, on the part of the Respondent.

In another case, *N. L. R. B. v. Ray Smith Transport Co.,* 193 F. 2d 142, 5 Cir. (1951) the facts were: One truck driver, Hillin, asked another, the dischargee Ban, about the latter's attempt to organize Respondent's employees, and who was among this group of organizers. Bain alone testified as to this conversation. The Board then made several inferences, not grounded by testimony, that Hillin communicated this information to his employer, and further inferred that the employer discharged Bain and others for this activity. The court said at page 144:

> "Turning to the evidence in respect of the discharge, because they are the gravamen of the Board's case—indeed they are the pivot on which it turns, it is at once evident that, to the mind of the examiner, the burden was not on the Board to prove that they were for union activity, but on the Respondent to prove that they were for cause, and also that, to his eager credulity, straws in the wind, offered in support of the Board's case, became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ.

". . . It was this attitude, and this alone, which enabled the examiner to disregard and discredit the positive testimony, not only of every employee of the Respondent, but of the disinterested witnesses, customers of the Respondent, who testified positively to the discourtesies to them for which Bain and Veazy were discharged."

Again at page 146:

"The findings were contrary to the law, because as we pointed out in *N. L. R. B. v. Fulton,* 5 Cir., 175 F. 2d 675, 290 U.S.C.A. §160 (c) prohibits the Board from requiring the reinstatement of any individual, 'if such individual was suspended or discharged for cause'. This court, before the amendment of the National Labor Relations Act, held without varying that membership in a union is not a guarantee against discharge and that when real grounds for discharge exist, the management may not be prevented because of union membership from discharging."

This is another case that directly applies to the facts in the case before us.

XIII.

FINDINGS OF TRIAL EXAMINER SHOW FAILURE TO FAIRLY WEIGH TESTIMONY

When the findings of the Trial Examiner within themselves show that the testimony of the parties was not fairly weighed; that is, that he unreasonably simply disregarded the Respondent's testimony; this, of course, woud indicate either prejudice, bias or inability to try the matter fairly. In such case, the reviewing court should, in view of the above cited decisions, review the evidence with the greatest of care.

The Board affirmed the findings of the Trial Examiner (R. 92).

In order to reach his conclusion, the Trial Examiner found that the testimony of Newsom impressed the Examiner, but that, on the other hand, Warden's did not impress him as truthful. However, in order to arrive at his conclusion, the Trial Examiner entirely ignored or refused to believe the testimony of Hathaway, Hardway, Kalins, Campbell, Stovall and Zitlaw, in addition to refusing to believe the testimony of Warden. The Examiner gives no reason why the testimony of these witnesses should be entirely ignored. Their testimony is not contradicted by any evidence at all and they are not impeached in any manner. There appears no fair reason in law why that testimony of the Respondent should be wholly ignored. In the testimony of these men is to be found good and substantial reasons why Newsom's employment was terminated and why it was not terminated sooner, and also is to

be found a positive and direct denial that the union activity of Newsom was any factor at all in the termination of his employment. Surely that evidence cannot be arbitrarily brushed aside. See *N. L. R. B. v. Goodyear,* 129 Fed. 2d 661.

The Concluding Findings of the Trial Examiner (R. 26) are based principally on two findings of the Examiner. First, that the discharge was not for cause, as "it seems incredible that if Respondent considered Newsom as guilty of all the shortcomings which it now attributes to him, that it woud have retained Newsom in its employ as an Instrument Technician so long as to become the oldest Technician in point of service." This is purely an inference (or rather an argument), drawn by the Trial Examiner. The reasons for the discharge and for retaining Newsom as long as the employer did, and the reasons why he was discharged at this particular time, have all heretofore been pointed out. This, being only an inference, is not binding upon this court. In the opinion of the Trial Examiner, this finding is "buttressed" by seven inferences, pointed out in the findings (R. 26, 27). These are all inferences which are not justified by the evidence. They consist of a passing remark made by Hardway in a friendly manner to Newsom after Newsom had left the Company; a remark of Kalins that if Newsom resigned, it "would make things easier"; a remark of Campbell in saying goodbye to Newsom, that he would make his mark sometime; Warden's statement that he was the only one in the department who could do some

routine work satisfactorily; Warden's admonition that Newsom should not talk with any of the employees about his discharge on Company time; Kalins' withholding Webb's promotion for a short time to ascertain when "things were settled"; lack of disciplinary action against other Instruction Technicians.

These seem to be exceedingly flimsy remarks of employees upon which to base any kind of finding of fact or upon which there can be charged to the Company a violation of the law. As, for instance, the fact that no disciplinary action was taken against the other Technicians, which is evidence that union activity was not the cause of the discharge, as they were equally involved. Instead of being evidence against Respondent it is evidence in its favor. The other inferences, which the Trial Examiner claims "buttressed" his findings, are equaly unconvincing.

It will also be noted from a reading of the findings that some of the evidence actually referred to in the findings does not bear out the inference or finding of the Trial Examiner. As, for example, it is apparently insisted that a conversation between Hathaway and Noble, his superior, shows the Company attitude and determination to discipline Newsom. That conversation is set out in the findings (R. 28) and a fair inference from that conversation would justify exactly the opposite finding; that is, that Mr. Noble left the judgment up to the department as to whether or not Newsom was a satisfactory employee.

The second finding referred to in the "Concluding Findings", and which is the only other finding quoted as "buttressing" the Concluding Findings, is the finding (R. 30) that Warden's statement to the Technicians on January 16, 1951 was imputable to the Respondent and supported the findings and order. This statement has already been referred to and the authorities cited have established that such a remark is not attributable or binding upon the Respondent. It must therefore be ignored. Thus, the main prop to the findings is destroyed.

The findings have been carefully analyzed by counsel for Respondent in his objections to Trial Examiner's Report. There counsel pointed out in what respects each finding and inference was unsupported by substantial evidence. The attention of this Court is directed to "Statement of Exception to Intermediate Report and Recommended Order" found on pages 37 to 81 of Transcript of Record. The references in the Exceptions are to pages in the original reporter's transcript, but have been checked and are correct and accurate.

XIV.

THE PETITIONER IS BOUND BY THE ORDINARY RULES OF LAW IN THE CONDUCT OF HEARING

There is no doubt but that the Trial Examiner and the Board are bound by the ordinary rules of evidence and of law in their conduct of the hearing. That is, the Trial Examiner must concede that the burden of proof in this case was upon the general counsel and Newsom and he should require them to assume that burden and, if they have not, he should find in favor of the Respondent. The record discloses that he completely ignored these rules of law. Furthermore, he has in his findings relied on conclusions drawn by witnesses as to the meaning of the statement of Warden as a fact "buttressing" his finding. Of course, the conclusion of a witness is not evidence as to what was said or meant by another witness.

The emphasis placed upon the statement of Warden also shows that the Trial Examiner completely ignored the rule of law that a statement from such an employee is not binding upon the employer. It is a very familiar rule that the findings of the Trial Examiner must be based upon a preponderance of the evidence. This rule is stated in the Act itself. Section 10(b) of the Act has the following final paragraph:

> "Any such proceeding shall so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopt-

ed by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

The second sentence of Subsection (c) of Section 10 of the Act contains this provision:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practices, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order . . . ."

This is a clear direction that the Board can only act upon a preponderance of the testimony.

XV.

TESTIMONY ESTABLISHING REASONS FOR THE DISCHARGING OF NEWSOM

Counsel realizes that this brief has already been extended at great length. The question involved, however, is important, not only to the Respondent herein, but to the public at large, as it involves the proper operation and maintenance of a very large public utility. Respondent has repeatedly contended that a great preponderance of evidence and all reasonable inferences to be drawn therefrom, establish beyond question that the discharge of Newsom was for good cause. This testimony can be readily found in the Transcript of Record.

Clearly, the employer is not required to give reasons for the discharge of an employee, nor is it required to prove that such discharge was for good cause or for any cause whatsoever. In this case, the employer is not required to justify the discharge of Newsom. The burden of proof is upon the petitioner. However, the employer produced convincing evidence at the hearing that the discharge of Newsom was on entirely different grounds than union activity.

In considering the reasons for the discharge, the history of the complaints against Newsom by his superiors must be considered. They must be taken as a whole and all together. They could be broken down, and each complaint might then seem weak, but, considered all together, they paint a very clear picture of the unsatisfactory work of this man. The evidence of

the inefficiency of Newsom is furnished by the Engineers and Station Chiefs who came into contact with him over a substantial period of time. In fact, it appears that everyone who had an opportunity to judge his work testified that his work was unsatisfactory. Two of the witnesses are now in the United States Navy, and are not now employed by the employer. The others are in the employ of the employer, but showed no prejudice at all against the employee. The unanimity of the opinion of the men in the best position to judge, is, in itself, a convincing fact justifying the discharge of Newsom. All of these men have denied that the discharge was influenced in any way by the union activity of Newsom.

In considering this testimony, it must be first remembered that the discharged employee was an Instrument Technician, who was charged with the duty of keeping the instruments in the great power plants in order. The power plants in question were Station B and the Silver Gate Plants in San Diego, and had a capacity of 160,000 kilowatts and 100,000 kilowatts, respectively, and supplied the City and County of San Diego with electricity. The responsibility of these men was very great and it was exceedingly important that the work of inspecting these instruments be done well and efficiently. No one can deny the right of employers, under these conditions, who have the responsibility of furnishing a great city with its electricity, to discipline its employees charged with the maintenance of the instruments on its powerful and tremendously expensive machines. Those charged with

the duty of maintaining the efficiency of these two great plants were in the best position to judge the qualifications of Newsom, and all testified that his work was unsatisfactory, and that he should be taken off the job. No one should dare to substitute their judgment for the judgment of these men. No one has attempted to dispute their testimony. No evidence produced indicates any lack of sincerity or ability on the part of these men, or any personal prejudice on their part against either Newsom or union activities, except the scintilla, if even that much, of evidence cited by the Examiner.

The person in the best position to judge the work of Newsom was his immediate superior, *Harold L. Warden,* Instrument Engineer. He first came to work for the Company in 1947 and was promoted to Instrument Engineer in March of 1949 (R. 189). He outlined the importance of the work of the Instrument Technicians, of which Newsom was one. (R. 191). He stated that the work was "of such a nature that errors, lack of accuracy, being lackadaisical, or, perhaps you might say, not caring too much, or not paying strict enough attention to the job, can be very detrimental in the matter of Station efficiency. It even could, under hazardous operation, cause plant damage or personal damage." (R. 191, 192). In his testimony, Mr. Warden further enlarged upon the importance of this work. (R. 192, 193). He further testified that Newsom's work was "spasmodic". At times he would do very satisfactory work, and at other times it was not satisfactory. The manner in which he performed his

work was not satisfactory to his superiors or to others. (R. 193, 194). Warden testified that he spoke with Newsom and explained the unsatisfactory nature of his work and reported his lack of efficiency to others from October of 1948, on. (R. 195, 196, 197, 198). He testified that the work of Newsom continued to be unsatisfactory and his inefficiency was discussed with Hardway, the Efficiency Engineer, (R. 197) and with Kalins, his successor. (R. 197). Warden and Kalins conferred with Newsom at a later date, in 1950, and informed him that unless his work became satisfactory and remained so, it would be necessary for him to leave the department. (R. 197, 198). He stated that upon occasions Newsom showed a disrespect to Warden, his superior. (R. 198, 199). Mr. Warden produced records, consisting of logs and reports, showing the inefficiency of Newsom. These will be discussed in another subdivision of this brief.

John T. Hardway, former Efficiency Engineer for the Company also testified as to the inefficiency of the work performed by Newsom. At the time of testifying, he had severed his connection with the Company and was a Lieutenant Commander in the United States Navy, stationed at the San Farncisco shipyard. He started his employment with the Company in June, 1946, as a Junior Engineer, and worked his way up to the position of Efficiency Engineer, to which position he was promoted in November of 1948. (R. 289, 290). He first observed the inefficient work of Newsom in June of 1950. (R. 291). There had been prior complaints, but on that date a meeting was held, at

which meeting Warden, Hardway and Newsom were all present. A friendly discussion was had and Newsom was warned to do better work. (R. 292, 293). Six weeks later there was another complaint, this time from Mr. Proutt, and an investigation was held, but nothing serious was brought to light. (R. 294). Campbell and Proutt complained again, and, together with Mr. Warden and Mr. Hardway, the matter was discussed and Newsom made excuses (R. 295). A system of rotation was established, and it was noticed that when Newsom was paired with another Technician, the work of both "fell down", and when the same Technician was separated from Newsom, that Technician's work improved. (R. 297). It was clearly the opinion of Mr. Hardway that the work of Newsom was unsatisfactory. (R. 298).

B. L. Stovall, formerly Efficiency Engineer for the Company, and at the present time a Lieutenant Commander in the United States Navy, stationed at the Industrial Command, U. S. Naval Station in San Diego, testified that he started to work for the Company in 1937 and gradually advanced through the grades, including some years of university training, until he became Efficiency Engineer in 1946. (R. 312). On his way up, he was Station Chief, Junior Engineer and Instrument Technician (R. 313). He had an opportunity to observe the work of Newsom and first came into contact with him in October of 1948 (R. 313). He heard complaints from the Operating Department to the effect that Newsom was doing inefficient work on the control instruments, and as to horseplay (R.

314, 315). Newsom showed a remarkable lack of initiative in attempting to grasp problems involved and was given to horseplay (R. 316). He found him to be temperamental and unsuited for the job with respect to Instrument Technician's work, and Stovall observed no improvement—"it was more or less pull and haul all the time." (R. 316). The job held by Newsom was one of the most important functions in the power house (R. 317). Stovall enlarged upon the matter of lack of confidence and inability to properly handle the controls. (R. 318).

Joseph L. Kalins was the Efficiency Engineer with the Company at the time of termination of Newsom's employment. He also advanced up through the grades with the Company and became Efficiency Engineer in September of 1950, succeeding Mr. Hardway (R. 323, 324). He testified that he first questioned Newsom's ability in May or June of 1950 (R. 325). He first discussed the matter with Newsom in September of 1950. (R. 327). After hearing several complaints from Warden, he went over the complaints with Newsom in the presence of Warden. Newsom excused every action about which there was a complaint, and became very angry. (R. 328). Later on, when Newsom was notified of termination or transfer, the witness Kalins definitely outlined to Newsom what grounds the complaints were based on (R. 335). These have been previously referred to.

Kalins testified that when these grounds were called to Newsom's attention, he wanted to put Warden

on the carpet before the men. (R. 335, 336). At this meeting, Newsom had a monopoly of the floor, and cited many childish reasons why Warden did not like him, and also excused himself by indulging in criticisms of Warden, according to the testimony of Kalins. (R. 336, 337). Mr. Kalins also testified that there had been a great improvement in the work of the department since Newsom left. As Kalins expressed it, "the department as a whole was more capable, more hard-working, more harmonious, and all around a much better department. (R. 339). Mr. Kalins attributed the improved condition of the department to the fact that Newsom had left.

Charles L. Hathaway is the Superintendent of Electric Production, and testified that he had been with the Company for 10 and one-half years, starting as Efficiency Engineer. He testified that he had had a great deal of experience prior thereto and this is fully outlined in his testimony (R. 359, 360). He testified that the first complaint he received about Newsom was early in 1950 from Mr. Campbell, Station Chief at Station B, which complaint was to the effect that the operating personnel were losing faith in the accuracy of the meters and of the inspection by Newsom (R. 360). Hathaway decided that it was best to separate Newsom and the other men, and the rotation program was then carried out. (R. 360). The inefficiency of Newsom was discussed also with Hardway (R. 361). Zitlaw, Station Chief at Silver Gate, informed the witness that he had had several complaints about the work done by Newsom, which was referred

to Mr. Kalins (R. 361). Later, Zitlaw also complained of the inefficient work of Newsom, which was also referred to Kalins. Kalins and Warden informed the witness that Newsom had given trouble in every combination that had been arranged, and there was much discussion among the three with respect to Newsom. (R. 363). Mr. Hathaway further testified in detail to the meetings heretofore referred to, and it was his opinion that the supervisors leaned over backwards to give Newsom a chance and showed no prejudice whatsoever against him. He relied quite strongly upon the criticism of Newsom given by Zitlaw and Campbell (R. 375). Mr. Hathaway testified to the requirements of the job and the necessity for harmony and cooperation. (R. 373). The meetings of January 15th with the men and January 30th with the Station Chiefs and Supervisory Engineers have already been detailed.

Kenneth Campbell, Station Chief at Station B, outlined rather extensively similar work prior to his employment by the Company. (R. 380, 381). He testified that prior to May, 1950, he received repeated complaints from men under him as to the work of Newsom (R. 383); that the work of Newsom continued to be unsatisfactory (R. 384); that after May of 1950 he noticed a sort of inactivity on the part of Newsom; that he seemed to have no definite objective ahead, and indulged in considerable horseplay (R. 384).

Walter S. Zitlaw testified that he was Station Chief at Silver Gate; that he started with the Company in 1941; that he had been Station Chief at Silver Gate

Station since 1943; that prior to his employment by the Company he had held a similar position with the Phelps Dodge Company. (R. 396). He testified that he noticed that the work of Newsom had become lax and was subject to other criticisms. He first recalled Newsom in 1949, at which time he made a favorable impression. But as time passed, he became lax in his duties and Zitlaw received numerous complaints concerning Newsom from operators and even from maintenance forces as to his lack of attention to duties (R. 397); that the work of Newsom continued bad and the witness received many complaints about him (R. 398); that he noticed that very little work was executed by Newsom and that work assigned to him was not being completed. (R. 399). The witness called the attention of Hathaway to the situation and stated that Newsom's work was lagging behind, and he further called it to Mr. Warden's attention, but that he, Zitlaw, found no improvement in the situation. (R. 400). He gave his general opinion of the work of Newsom in the following language: "He has exceptional ability, when the work is to his interest; if he finds interest in the work, he can do a good job and can do it with dispatch. The work we have is not the type of work that will hold his interest over any period of time, and he doesn't fit that picture at all. . . . I suppose it is his temperament and attitude toward the job. He doesn't seem to accept the job for what it is. . . . Because of the failure to continue to prosecute each assignment that was his, each responsibility that was his, he would let them go by for lesser things, or for just laughs, doing

nothing." (R. 400, 401). The witness also noted that Newsom spent more time in his office than he should have; that he was guilty of other inefficient work than described above (R. 401).

All of the above witnesses testified emphatically that Newsom's union activities did not in any way affect them in their opinion of his work, nor did it affect their decision as to his termination.

XVI.

ASSISTANCE GIVEN BY SUPERIORS TO FURTHER UNION APPLICATION

It is admitted by all of the witnesses, including Newsom himself, that his superior officers in one way or another offered to and did give him and his associates considerable help in their efforts to obtain union recognition. This is certain proof that the superior officers did not entertain any prejudices against him, nor did they discriminate against him because of his union activities.

In the first conversation, Warden agreed that it was a good thing for them to join the union (R. 107). He offered to help them and did obtain a job classification sheet for them (R. 188, 288). Mr. Warden testified that he told the men that he would assist them in any manner that he could (R. 188, 202). He also testified that Mr. Hathaway stated that he would work with the men, through Warden, in any manner that he could, such as supplying them with information that

might be necessary to prepare a complete and satisfactory demand or request (R. 202).

Shroble testified to Warden's offers to help (R. 169), and Fowler testified to Warden's actual assistance in furnishing the job classification sheet (R. 188). This classification sheet was furnished and is in evidence as Employer's Exhibit 1. The evidence is clear that all of the immediate superiors of these men offered to help and stood ready and willing to help, and to furnish all of the information necessary, and none of them put any obstruction in the way of union activities. All of them also testified that the union activities of the men played no part in the dismissal. The fact also remains that the other men are still in the employ of the Company and are doing satisfactory work, except Botwinis who voluntarily left the Company for other employment.

It is also evident that the employees of the employer are well organized and the employer deals with the union all of the time. The record of the employer therefore does not indicate that it had any prejudice or is apt to discriminate against these men or their union activity.

If the Trial Examiner had approached his decision in a fair-minded attitude toward the employer, he would have inferred from this testimony that the Company woud not use any pressure to prevent these employees from joining the union and, in fact, would help them do so.

XVII.

NEWSOM'S ATTITUDE TOWARDS SUPERIORS WAS SUFFICIENT CAUSE FOR DISCHARGE

The reading of the testimony in the record would disclose to an impartial mind that Newsom's attitude against Warden and his superior officers was that of a quarrelsome, uncooperative, and opinionated employee who believed that he knew more about the job than his superior officers and that he was bound to put his superiors in as bad a light as possible. (R. 217-217, 284). According to Newsom's own admission, he stated at one time that he was going to pursue this matter "if only for its nuisance value." (R. 154). This is further testified to by Warden (R. 218) and Kalins (R. 387). This is a further indication that the attitude of Newsom was highly improper and this was testified to by his superiors.

XVIII.

RECORD OF INEFFICIENCY ON LOGS

Respondent presented before the Trial Examiner some logs and records kept by Newsom, showing his inefficiency and errors and mistakes. Trial Examiner has attempted to make it appear in his findings that this was the only evidence presented of the inefficiency of Newsom, and that this evidence was discovered after his termination. This evidence is only cumulative and is another reason why he should have been terminated, and it can be considered as showing the inefficiency of Newsom, even though it was only discovered after his discharge. It is true that the discharge is based upon other evidence of inefficiency, and this later discovered record only confirms the decision.

The Respondent offered in evidence reports on tests on Unit Turbines Nos. 1, 2 and 3 at Silver Gate, and combustion checks made on Boilers 3, 4 and 5. These are contained in Respondent's Exhibit 2, and are attached to the Transcript of Record beginning at Page 441. These records were described and explained by Mr. Warden in his testimony beginning at R-223, and continued during his direct examination through Transcript of Record, Page 241. On Page 444 of the Transcript of Record is a photostatic copy of Page 2 of a two-page record made during the boiler tests. In this case, Newsom disregarded all that portion of the test which has been circled. This data is of considerable importance, as boiler performance and operation

is studied, particularly in cases of future problems where it becomes necessary to determine fully such phases of past performance. Had Newsom properly performed the test, then he would have been compelled to make known each burner setting and see that it corresponded to a rating under which the boiler was operating. Accordingly, he should have recorded his readings. The condition of this report raises a question as to whether or not the burners had been properly adjusted. This is all expressed in the testimony of Warden (R. 226).

At Page 445 of the Transcript of Record is a photostat of another boiler test. This, again, illustrates the negligence, carelessness and refusal to carry out instructions on the part of Newsom. The readings circled in the left hand side of the sheet, show that the excess air in this boiler was running at 12 to 13%. The instructions were that the excess air should be set at 19%, plus or minus 2%. In total disregard of such instructions, Newsom ran the entire test with low excess air and made no attempt to correct it. (R. 208).

The area circled on the right hand side of the sheet (R. 445) illustrates the carelessness and irresponsibility of Newsom in failing to record the burner position or the register setting. On this very same sheet he recorded the burner position and register setting for Boiler No. 3, and neglected to do so for Boiler No. 4. This illustrates the inconsistency in his work. (R. 208).

On Page 446 of the Transcript of Record, other errors appear on the part of Newsom. The errors themselves were not of a really serious nature. The hearing, however, was greatly confused by these errors in the technicalities involved and the constant and biased interruptions and questions of Examiner. (R. 229-232). At Page 448 of the Transcript of Record is a sheet showing errors similar to the above. Newsom was in error in the reading which he recorded for the steam flow. He recorded 515, whereas the reading would more accurately have been 520, as was pointed out by Warden in his testimony. Such an error, if carried through a turbine-generator performance, would result in a very erroneous set of data. The result would be a useless test, which would have to be done over (R. 234-236). Here, again, much confusion was generated at the hearing, with regard to the establishing of correct steam flow readings. The Trial Examiner, as appeared from the record, assumed the role of Prosecutor for a time, as he did in other instances, and challenged the accuracy of the reading "520".

At this point it should be again remembered that Newsom was an important part of a group whose work and record meant a great deal to the operation of the plant. This would be true both for current and future operation. Test data acquired today may be filed and not referred to for several months or years, at which time it becomes extremely important that the data be accurate and complete; otherwise, the entire value is lost.

It is conceded that the above is not of great weight, because of the fact that it was discovered after the termination of Newsom. Counsel for Respondent again insists, however, that it is a record made in Newsom's own handwriting, which proves that the statements made by the Supervising Engineers, upon which the termination was based, were true and correct and were not products of the imagination.

Both the Trial Examiner and counsel for the Board attempted to belittle this evidence and made a tremendous issue of it during the hearing and claimed that it proved that the employer had no real cause for terminating Newsom. It is argued by the Trial Examiner that this evidence is all the employer had to justify the termination, and that, therefore, it shows a lack of cause on the part of the employer. A reading of the Transcript of Record (R. 223, 258) will inform the Court as to these failures on the part of Newsom as well as to the unfair tactics of the Trial Examiner. There are also many other errors which were committed by Newsom, as shown on the logs and written reports. These will be noted by a reading of the testimony of Newsom and the Exhibits attached to the Transcript of Record. The testimony of Newsom as to these errors commences at about R-220.

Mr. Warden also testified to a very serious, deliberate fraud in the Record. In the early part of February, 1951, it was discovered by Warden that Newsom had signed the name "Webb". This was above a complete alarm check record. Warden confronted Newsom

with this and asked him about it and Newsom took out an eraser and said "I put that down just for laughs." (R. 220, 221). This, it will be noted, occurred before Newsom's termination.

XIX.

NEWSOM WAS NOT ACTUALLY DISCHARGED

The entire case rests upon the assumption that Newsom was discharged for union activity. As a matter of fact, he was not actually discharged. For the good of the Company, and the department, it was decided to assign him, or transfer him, to another department. Mr. Kalins told Newsom that "he could transfer to some other department by making the appropriate application with the Personnel Department, but that his termination, however, in any case, would be in two weeks, which would be February 14th. We told him that he could resign without prejudice, or, if he chose, he would be discharged." (R. 338). Newsom did not answer directly, but said that he would let them know on the following day, and he never again said anything about the transfer. (R. 338). Not having heard from him as to his choice in the matter, he was terminated on February 14th. (R. 338). According to the testimony of Kalins, Hathaway had stated that "it would be all right if Mr. Newsom transferred to some other department" and this was stated at the supervisor's meeting of January 30th. (R. 353). Therefore, strictly speaking, Mr. Newsom had the option of being transferred to another department. This he refused to take,

and so was discharged. There is no doubt at all but that the employer had the right to transfer Newsom to another department.

It is quite evident that the actual discharge was at the choice of Newsom. As a matter of fact, therefore, this entire case should fall, because of the lack of any evidence that the employment of Newsom was terminated. Certainly the above shows that the termination, if there was one, was not because of union activity, because he was offered a choice of remaining with the Company in another department thereof.

CONCLUSION

In conclusion Respondent earnestly prays this High Court to refuse to enforce the Order. The effect of an Order to enforce would be very far reaching and would greatly interfere with the right of this large Company to conduct its own business and to produce electricity for which it is held responsible by the people of this area and by other Boards and officials of this State.

This is a very unusual case as nowhere in the cases examined has Counsel found one where the evidence of discharge for Union activity is so weak, or the evidence of good cause for the discharge of the employee so strong.

Obviously neither the Trial Examiner or the Board placed any credence at all upon the testimony of trained engineers of the Respondent without any rea-

son or any conflict in the evidence or any reliance upon anything at all. The Trial Examiner merely refused to listen to them.

It is also clearly apparent that neither the Trial Examiner or the Board paid any attention to the law cited by Counsel for Respondent. Otherwise they would not have relied at all upon the statement allegedly made by Warden.

In view of the obvious weakness of the supporting evidence cited by the Trial Examiner and the Counsel for Petitioner, and the rules of law above cited, this Respondent has a right to ask, and this Court should review, the evidence found in the Transcript of Record.

It is submitted finally that the Order of the Board is not supported by *substantial* evidence and the Petition should be denied.

Respectfully submitted,

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